No. 93-1631

IN THE

Supreme Court of the United States

OCTOBER TERM 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner,

v.

COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

David C. Vladeck
(Counsel of Record)
Ann M. Begley
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*

September 16, 1994

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes and Legislative Materials:

IN THE

Supreme Court of the United States

OCTOBER TERM 1994

No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE TREASURY,

Petitioner,

v.

COORS BREWING COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

Amicus curiae Public Citizen, Inc., files this brief with the consent of the parties because of the vital First Amendment and public health concerns at stake in this case. In our view, there can be no question that the ban imposed by section 205(e)(2) of the Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 205(e)(2), which prohibits the disclosure of the alcohol content of malt beverages on their labels unless that disclosure is explicitly mandated by state law, violates the First Amendment. Truthful, non-deceptive information that empowers consumers to make informed

choices that directly affect their health and well-being and the safety of others may not be suppressed absent the most compelling of reasons. Although the interest that the government claims is furthered by the ban -- the prevention of "strength wars" among competing brewers -- is perhaps a valid one in the abstract, there is no support for the assertion that Congress had this interest in mind when it enacted the FAAA, nor is the labeling ban even a remotely reasonable way to achieve that end. Accordingly, this Court should affirm the ruling below.

INTEREST OF *AMICUS* AND SUMMARY OF ARGUMENT

Amicus Public Citizen is a national public interest organization, with over 125,000 members. For 23 years, Public Citizen has worked to obtain and disseminate information relating to the price, safety, and quality of foods, drugs, medical devices, automobiles and other products and services so that consumers can make informed decisions in their purchases. This case is about such a product -- beer, which many Public Citizen members consume. And like most consumers, Public Citizen's members have a legitimate interest in being able to distinguish among beers and other malt beverages on the basis of alcohol content.

Not only has Public Citizen long been active in matters relating to public health, but it has also been in the vanguard in pressing for extending constitutional protections for *truthful* commercial speech. For example, Public Citizen's lawyers represented the consumer plaintiffs in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and have handled two more recent commercial speech cases in this Court, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 113 S. Ct. 1792 (1993). They also filed *amicus* briefs in a number of other commercial speech cases, including *Peel v. Attorney Registration and Disciplinary*

Comm'n of Ill., 496 U.S. 91 (1990), *In re Primus*, 436 U.S. 412 (1978), *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *Bates v. State Bar of Arizona*, 433 U.S. 733 (1977).

Public Citizen files this brief because it is concerned that the interests of those who have the most at stake in this proceeding -- beer drinkers who may wish to moderate their alcohol consumption -- may not stand out in the parties' more comprehensive treatment of the legal issues before the Court. We do not seek to duplicate or repeat the arguments that will be put forth by respondent. Rather, we seek to highlight three main points:

First, the government's position depends on the long-rejected proposition that government-enforced ignorance is acceptable under the First Amendment -- a proposition that we believe was laid to rest in *Virginia Board of Pharmacy*. As this Court has repeatedly said, it is for "the speaker and the audience, not the government[, to] assess the value of the information presented." *Edenfield*, 113 S. Ct. at 1798. Here, of course, the government's sole justification is that armed with information about alcohol content, consumers will almost invariably make the "wrong" choice and select the more potent beverage. Blatant paternalism of this sort runs counter to fundamental First Amendment values and should not be tolerated.

Second, the government's effort to ratchet down the level of scrutiny to be applied should be rejected out of hand. The government argues that the constitutionality of the ban should be sustained if it can show that Congress had a "reasonable belief" at the time the labeling ban was enacted that the ban would ward off strength wars. Not only does the government's proposed "reasonable belief" standard fly in the face of prior cases which reject the idea that in First Amendment cases courts should blindly defer to legislative judgments, but there simply is no support for the

government's assertion that Congress enacted the labeling ban to prevent strength wars.

Third, even assuming that Congress enacted the labeling ban to deter strength wars, the ban must still fall because there is little correlation between the Congress' goal and the categorical ban it has imposed. Indeed, there are far more direct ways to discourage strength wars that do not abridge the First Amendment rights of consumers and brewers.

ARGUMENT
THE LABELLING BAN IS UNCONSTITUTIONAL.

A. Paternalistic Restrictions on the Disclosure of Truthful, Non-Misleading Information Violate the Principles Established in *Virginia Board of Pharmacy* and Harm Consumers.

In holding that commercial speech is entitled to substantial protection under the First Amendment, this Court has recognized "that the free flow of commercial information is indispensable ... to the proper allocation of resources in a free enterprise system ... [and] to the formation of opinions as to how that system ought to be regulated or altered." *Virginia Board of Pharmacy*, 425 U.S. at 765. Thus, "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield*, 113 S. Ct. at 1798. "Commercial expression not only serves the economic interests of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). *See also Edenfield*, 113 S. Ct. at 1798 (First Amendment coverage of commercial speech is designed to safeguard "societal interests in broad access to complete and accurate commercial information.")

Ever since *Virginia Board of Pharmacy*, it has been clear that this Court has little tolerance for government-imposed prohibitions based on the theory that it is "better" to keep the public in the dark about truthful, non-deceptive information. In *Pharmacy Board*, the Court reasoned that the state's interest in suppressing the advertising of prescription drugs "is a protection based in large part on public ignorance." 425 U.S. at 769. Rejecting the state's "paternalistic approach" of government-enforced ignorance, the Court stressed the common-sense idea that "people will perceive their best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770; *see also Edenfield*, 113 S. Ct. at 1798 (this Court's cases reflect the preference that "the speaker and the audience, not the government, assess the value of the information presented.")

The government's rationale for enforced ignorance in this case is no more compelling than the one flatly rejected by the Court in *Virginia Pharmacy Board*. Just as consumers have a legitimate interest in the price of prescription drugs, they have a legitimate interest in knowing the alcohol content of the beer they consume. An illustration will make this clear.

Suppose Mary P. Smith goes to her supermarket to shop. Stopping at the cereal section, she carefully reads the labels on two brands of corn flakes to see which one contains more of the iron her doctor told her she needs. After learning that the iron content in corn flakes varies widely, she chooses the brand highest in iron. On her way out of the store, Mary stops to pick up a six-pack of beer. She likes to keep beer on hand for friends, but hates to see them leave her house intoxicated. She examines the cans for information on alcohol content, but finds none. Next she asks the store manager which beer has a moderate or low alcohol content, but the manager does not know either, although he has heard rumors about the potency of various

brands. Unwilling to buy beer without knowing its alcohol content, Mary picks up a bottle of white wine (clearly labeled, as is required by the FAAA, "Alcohol 13.2%, by volume"), and leaves the store, perplexed.[1]

Mary is only one of millions of perplexed consumers. Except for those who purchase beer in the ten states that require alcohol content disclosure, consumers have no practical means of obtaining information about the potency of beers, a dangerous situation given that commercial beers range in alcohol by volume content from about 3% to 9%. Perpetuating public ignorance about alcohol content of beer, and thus eliminating public choice, guarantees only that beer will be consumed unwisely. In light of public concerns about alcoholism, drunk driving, and calorie consumption (which is related directly to alcohol content), it is likely that some consumers, if not most, would use alcohol content information to *reduce* their alcohol intake. Under the present law, they are denied even the opportunity to make that responsible decision. This information gap can pose a hazard to both beer drinkers and the public at large. For example, a person who drives to a party might seek to moderate his or

---

[1] It is highly ironic that the government defends the alcohol labeling ban on beer at precisely the same time the government has shown an increased appreciation of the rights of consumers to know the nutritional contents of foods. Under the recently enacted Nutrition Labeling and Education Act of 1990 ("NLEA"), Pub. L. No. 101-535, 104 Stat. 2353, virtually all food products sold in the United States will have to bear a comprehensive label disclosing a broad array of nutritional information. *See* 21 U.S.C. § 343(q) (1994 Supp.). Public Citizen believes that Congress should revisit the question of alcohol labeling, and using the NLEA as a model, require the comprehensive labeling of all alcohol products, so that the public may make meaningful comparisons, not only within product types -- like malt beverage -- but also among products, such as a disclosure of alcohol content per routine serving.

her alcohol consumption. Yet, because of the labeling ban, that person is not likely to appreciate that drinking two beers with an alcohol volume of 8% is the equivalent of consuming five beers that have an alcohol volume of 3.2%.

This result is intolerable. As we show below, if there is any force to the government's concern about "strength wars," which we doubt, they can be addressed by direct means that do not infringe the First Amendment rights of consumers and brewers. But keeping the public in the dark about truthful, non-misleading information that affects their safety and well-being is, after *Virginia Board of Pharmacy*, indefensible.

Finally, it bears emphasis that the governmental justification here is far weaker than that asserted in any prior commercial speech case. Unlike most commercial speech cases that have involved efforts to suppress speech that was allegedly false, misleading or deceptive -- *e.g.*, *Ibanez v. Board of Accountancy*, 114 S. Ct. 2084 (1994); *Edenfield*; *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) -- here, the government concedes that the speech it seeks to suppress is completely truthful, accurate, and non-deceptive. As the Court held last Term in *Ibanez*, it is hard to "imagine how consumers can be misled by ... truthful representation[s]." 114 S. Ct. 2089.

Nor is this case like either *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986) or *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993). The advertising prohibitions at issue in those cases were justified by the government's concededly legitimate interest in discouraging residents from engaging in the underlying conduct that was to be encouraged by the advertising -- namely, gambling. Here, of course, the government has disavowed any interest in discouraging Americans from drinking beer; indeed, it freely permits advertising aimed at *increasing* demand for beer and other malt beverages. Thus,

the rationale of *Posadas* and *Edge* does not rescue the ban at issue here.

B. The Government's Proposed "Reasonable Belief" Test Cannot Be Squared With Basic Commercial Speech Jurisprudence.

In *Central Hudson*, this Court announced that the "party seeking to uphold a restriction on commercial speech carries the burden of justifying it." 447 U.S. at 570. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 113 S. Ct. at 1800 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985)).

The government apparently recognizes that it cannot shoulder its burden in this case. Instead, the government seeks to be relieved of its burden by arguing that, because it has a strong interest in promoting moderation in alcohol consumption, all it must show to prevail is that Congress had a reasonable belief that the ban was needed when it was enacted. U.S. Br. at 35. Congress' reasonable belief, the government argues, is enough to satisfy the pivotal components of the *Central Hudson* test, namely that the ban is narrowly tailored to directly further the ends the government seeks to achieve. *Id.*

This argument should be rejected for several distinct, albeit related, reasons. First, the government's argument seeks to conflate the narrow tailoring requirement in commercial speech cases with the rational basis test -- a proposition this Court flatly rejected in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993); *Board of Trustees v. Fox*, 492 U.S. 478, 480-82 (1989) for good reason. First Amendment review requires that the government regulate with a high degree of precision that is

not required under rational basis review, a point this Court underscored in both *Discovery Network* and *Fox*.[2]

Second, the standard the government proposes would give it free reign to abridge citizens' fundamental rights to receive commercial information on the basis of mistakes, misconceptions, and outmoded or out-of-date justifications. Surely the restraints struck down in cases like *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), would have survived the government's proposed "reasonable belief" analysis. The government's approach would run directly counter to this Court's insistence that categorical restraints on commercial speech be carefully scrutinized.

Third, the government's "reasonable belief" test would be difficult to apply in practice, since it seeks to cut judicial review loose from the evidentiary moorings identified in *Edenfield* and to replace them with a far less rigorous assessment of whether the Legislature, rightly or wrongly (so long as "reasonably"), believed that there was a reasonable fit between the ends it sought to achieve and the means it selected. Indeed, what the government is actually proposing is a lenient standard of review which is dependent on the government's policy judgment regarding the value of the

---

[2] The government claims that its "reasonable belief" theory draws support from this Court's opinion in *Posadas*, which the government contends suggests that advertising about "a socially harmful activity ... warrants even less protection under the First Amendment than other forms of commercial speech." U.S. Br. at 41. Nothing in *Posadas* supports the proposition that this Court was creating a hierarchy of values within the commercial speech field, let alone establishing multiple standards of review for assessing restraints on commercial speech. In fact, the *Posadas* Court dutifully applied the *Central Hudson* test. The government's argument is also flawed for the reasons discussed above, since here, unlike in *Posadas*, the ban is not directed at an activity that the government seeks to discourage.

underlying activity or the risk that the activity poses. This standard is far too malleable to be workable in practice. Suppose Congress sought to ban all advertising for "gas guzzling" cars to promote fuel efficiency. Would a reviewing Court have to defer to Congress' "reasonable belief" that the ban furthers a substantial governmental interest, or would a reviewing Court apply the *Central Hudson* test and insist that the government actually show that there was a direct correlation between the means and ends?

In our view, this Court should reject the government's effort to evade strict application of *Central Hudson*. There is no reason to believe that the *Central Hudson* test opens the floodgates to too much commercial speech or that it needs to be overhauled. *Cf. Edenfield*, 113 S. Ct. at 1804 (Blackmun, J., concurring). To the contrary, where the government seeks to impose strict regulations on a hazardous activity, that factor enters into the *Central Hudson* calculus when the Court assesses whether the government has a substantial interest in limiting it. Demonstrating a substantial interest, however, hardly gives the government license to use categorical restraints where far less onerous and more direct means are available, as this Court made crystal clear in *Fox* and *Discovery Network*.

There is one final point worth noting about the government's argument: even were the Court to apply the lenient standard of scrutiny the government urges, that still would not salvage the government's case. The government has argued that the purpose of the ban is to prevent "strength wars" based on truthful statements of alcohol content. However, nothing in the language of section 205(e)(2) suggests that Congress had "strength wars" in mind when it enacted the provision. Likewise, the legislative history of section 205(e)(2) suggests that Congress' focus was not on the danger of truthful communications -- which is the only type of communication at issue in this case -- but on the danger of deceptive advertising. The House Report identified concerns about "unscrupulous advertising" and

"deceptive labeling practices" and noted that statements about alcohol content were proliferating "irrespective of th[e] falsity of such statements." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12-13 (1935). No mention is made of "strength wars." The Senate Report is to the same effect. S. Rep. No. 1215, 74th Cong., 1st Sess. at 6-7 (1935).

This history suggests that Congress' chief concern was not that the dissemination of *accurate* information would somehow encourage strength wars. Rather, Congress appears to have been troubled about inaccurate and deceptive labeling -- problems which the government has the power and ability to control. Indeed, Coors does not, and, we submit, could not plausibly contest statutory restrictions on the use of descriptions like "strong," "high-test," or "dynamite" on labels or in advertising. Thus, the government's case rests on the false premise that section 205(e)(2) is aimed at staving off strength wars. Because the ban does not advance any substantial governmental interest, but rather deprives consumers of important information, the labeling ban cannot stand.[3]

---

[3] There are other reasons to doubt that Congress imposed the labeling ban to avert "strength wars." For one thing, the ban's purported rationale would seem to apply equally to all types of alcoholic beverages, yet the ban applies only to beer and not to wine or spirits. As the Court recently explained in *City of LaDue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994), inconsistent regulation in the First Amendment area "may diminish the credibility of the government's rationale for restricting speech in the first place." The exception for states laws mandating the disclosure of alcohol content also undermines this theory. Furthermore, if the strength war theory were plausible, the absence of alcohol content labeling ought to steer a high percentage of malt beverage buyers to the potent "malt liquors," which contain more alcohol than ordinary beer. But the statistics show that "malt liquors" capture only a very small fraction of the market, especially when contrasted with the low alcohol beers.

C. The Ban Fails The Narrow Tailoring Requirement Of *Central Hudson*.

The final element of the *Central Hudson* test is whether the regulation is "narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480. Here, the government carries an especially "heavy burden of justifying" the restriction because it imposes a "categorical prohibition against the dissemination of accurate factual information to the public." *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 109 (1990).

The government has not met its burden. The labeling ban proscribes far more speech than is necessary, particularly in light of the fact that the information at stake is entirely truthful and non-deceptive, and has considerable value to consumers seeking to exercise responsible judgment about their alcohol consumption. Indeed, the government cannot deny that many, if not the overwhelming majority of consumers, would use information relating to alcohol content in a responsible fashion.

Notwithstanding the evident value of this information to consumers, the government argues that all consumers should be deprived of this information because *some* beer drinkers might choose beers based on their high-alcohol strength, and that the ban is needed to forestall a "strength war" aimed at that segment of the beer-buying public. U.S. Br. at 35. Given the growing stigma attached to alcohol abuse, and the increasingly stiff criminal penalties that are imposed for public intoxication and driving under the influence of alcohol, we question how many beer drinkers would choose a beer solely on the basis of its high alcohol content. Nonetheless, even assuming that this was the goal Congress had in mind when it enacted section 205(e)(2) -- which we doubt -- simply denying consumers ready access to information about alcohol content is at best a perverse way to achieve Congress' goal, if not the most oblique route imaginable. Congress had numerous and obvious less-

burdensome alternatives to the labeling ban, yet there is no evidence that Congress even considered them.[4]

First, as the government recognizes, Congress could impose strict limits on the amount of alcohol any product that identifies itself as "beer" may contain. The federal government prescribes "standards of identity" for products in many contexts to prevent consumer deception and fraud, *see, e.g.*, 21 U.S.C. § 341, and this approach would guarantee that "strength wars" would not erupt. The government's half-hearted explanation as to why Congress eschewed this approach -- namely, that it wished to avoid interfering with state regulation of alcohol -- misses the mark because Congress could have expressly allowed for superseding state law, just as it did in section 205(e)(2).

Second, the government could impose differential taxes based on the alcohol content of malt beverages, similar to the differential tax already imposed on wine based on alcohol content. *See* 21 U.S.C. § 5041. This too would strongly discourage "strength wars."

Third, the government could regulate speech relating to alcohol strength with greater precision to ensure that brewers did not make any representations in their advertising touting the strength of their beers. We submit that the availability of these and other alternatives -- never considered by Congress -- show that the labeling ban fails the "reasonable fit" inquiry prescribed by *Central Hudson*, and for that reason as well, the judgment below should be affirmed.

---

[4] In this respect, the labeling ban is far more problematic for consumers than the advertising ban at issue in *Virginia Board of Pharmacy*. At least in that case, consumers could find out about the price of prescription drugs, although consumers would have to canvass their local pharmacies to determine price. Here, the ban is virtually an absolute one, since a consumer could not learn the alcohol content of a particular malt beverage from either the label or the vendor.

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed in all respects.

Respectfully submitted,

David C. Vladeck
(Counsel of Record)
Ann M. Begley*
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*

September 16, 1994

---

* Ms. Begley is awaiting admission to the Bar of the Commonwealth of Virginia. Counsel wish to acknowledge the assistance of Fred Bernstein, a recent graduate of New York University School of Law.